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No. 07-1029

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IN THE

Supreme Court of the United States

WALTER A. FORBES,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

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No. 07-1029

WALTER A. FORBES,
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v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

A. The Circuit Conflict Is Extraordinary.

Surely it is not common for a case to reach this Court in which the division among the lower courts is more clear, more entrenched, and so widely pointed out by courts and commentators. Even the government acknowledges grudgingly that "courts have articulated different views of Rule 801(d)(2) in different contexts." Br. 14.[1]

[1] The government's brief does not discuss its recognitions of the conflict in other courts. See Pet. 29. "Br." refers to Brief in Opposition; "Pet.," Petition; "PCA," Petition's appendix; "CAA," Court of Appeals appendix; "Ad.," addenda hereto.

1. The government stresses that no prior Rule 801(d)(2) decision excluded prosecutorial admissions on the ground "they were made inadvertently," Br. 15—as the Second Circuit did here, applying its "innocent explanation" exception to the Rule. The Second Circuit, the government maintains, nevertheless would allow government admissions in evidence "in appropriate circumstances." Br. 19. But the government does not deny that in the Second Circuit (and, it fails to note, the Fourth and Eleventh also) "appropriate circumstances" for admissibility under the Rule vanish if the government interposes an "innocent explanation"—here, its claim that on at least five occasions prosecutors made an "inadvertent" written "mistake." Br. 14. Nor can the government deny that in the First, Sixth, Eighth, Ninth and District of Columbia Circuits, such evidence is admissible. In those circuits the evidence comes in, and any arguments to disbelieve it because of claims of innocent mistake must be presented to the jury.

2. The government questions whether the widely-cited Second Circuit decision on which the District Court relied, *United States* v. *McKeon*, 738 F.2d 26 (2d Cir. 1984), really concerned Rule 801(d)(2). Br. 22. No one else shares that doubt. The *McKeon* opinion explicitly reviewed whether a statement was "an admission under Rule 801(d)(2)." 738 F.2d at 29. The Second Circuit subsequently described *McKeon* as the basis for holding a government attorney's statements "not admissible under Rule 801(d)(2)(D)." *United States* v. *Ford*, 435 F.3d 204, 215 (2d Cir. 2006). The Eleventh Circuit adopted *McKeon* as its own position in determining "admissib[ility] under Rule 801(d)(2)." *United States* v. *DeLoach*, 34 F.3d 1001, 1005 (11th Cir. 1994). These cases were cited

in the petition, but are unmentioned in the brief in opposition.

3. Also wholly ignored are the numerous state-court decisions, Pet. 28, that replicate the federal division, on which they comment. That list grew on February 14, when the highest court of Maryland expressed dismay that "[s]ince the adoption of the Federal Rules, the federal circuits have drifted apart in their interpretation of Rule 801," leaving a "jurisprudential gully" with "federal circuits . . . distributed between . . . two poles," and "[t]he States and the District of Columbia are split as well." *Bellamy* v. *State*, 941 A.2d 1107, 1115-16 (Md. 2008). What that court calls a "difficult and fractured" conflict in interpreting a single text, *id.* at 1115 n.16, the government shrugs off as "semantic disagreement." Br. 22.

4. The circuit split is not simply, as the government attempts to revise it, whether "statements by federal attorneys are *categorically* outside the coverage of Rule 801(d)(2)," Br. 20 (emphasis supplied)—even though the Seventh and Fifth Circuits indeed have excluded admissions by government agents as a class. Pet. 18-19.[2] What matters for

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[2]"[T]he Seventh Circuit has held that the party admission rule should not be applied against the government in criminal cases . . . ." *Harris* v. *United States*, 834 A.2d 106, 120 (D.C. 2003). The government speculates that the Seventh Circuit some day might change its mind for "statements made to a court by a government *attorney*," Br. 17 (emphasis in original), because that court acknowledged its conflict with the First and D.C. Circuits in *United States* v. *Zizzo*, 120 F.3d 1338, 1351 n.4 (7th Cir. 1997). *But see United States* v. *Prevatte*, 16 F.3d 767, 779 n.9 (7th Cir. 1994) (in spite of circuit conflict, "[w]e see no reason to disturb this longstanding rule."). Similarly, because

certiorari is that the Second Circuit and those that follow it exclude such admissions if the government offers an "innocent explanation," *McKeon*, 738 F.2d at 33—while five other Circuits hold such statements to be admissible under Rule 801(d)(2) without any such judge-made exception. Pet. 15-17.

5. Nowhere in its brief does the government attempt to defend as correct the Second Circuit's elaborate revision of Rule 801(d)(2)—what one court calls *McKeon*'s "five policy considerations, in addition to the three-part test," *Bellamy*, 941 A.2d at 1115 n.16—which does not even pretend to be based on text or legislative history.[3]

B. The Exclusion Applied Rule 801(d)(2).

In this Court the government argues for the very first time that these admissions "were readily excludable under Fed. Rule of Evidence 403," Br. 14, which it incorrectly implies was "the basis of the exclusion here," Br. 16. Two glaring flaws expose that sleight-of-hand: First, both courts below ruled only under Rule 801(d)(2), the District Court explicitly, and neither they, nor the government, ever

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the Fifth Circuit in holding Rule 801(d)(2) inapplicable to a government investigator noted its conflict with other circuits, the government perceives that "the Fifth Circuit has not categorically resolved whether Rule 801(d)(2) is inapplicable to statements by *prosecutors*." Br. 18 (emphasis in original), citing *United States* v. *Garza*, 448 F.3d 296, 298 n.14 (2006).

[3] *United States* v. *Yildiz*, 355 F.3d 80 (2d Cir. 2004), cited Br. 21 n.4, "reaffirm[s]" the Second Circuit's atextual approach to Rule 801(d)(2) "in light of legal developments that have led some courts and commentators to question its validity." *Id.* at 81, citing, *inter alia*, *United States* v. *Morgan*, 581 F.2d 933 (D.C. Cir. 1978).

so much as mentioned Rule 403. Second, the government's prior statements could not even colorably have been excluded under Rule 403.

(a) The District Court explicitly stated that it was "excluding as admissions under Rule 801(d)(2)," PCA 14a, applying *McKeon*'s "innocent explanation" test, PCA 11a, 13a, 15a.[4] The Second Circuit agreed that by claiming to have been "mistaken," "the Government offered a sufficient explanation." PCA 6a. The District Court never purported to engage in the weighing of probative value against potential unfair prejudice, delay or confusion that Rule 403 would have required.[5] And not once in the District Court, and not once in the Court of Appeals, did the government so much as whisper Rule 403.

(b) Had the District Court invoked Rule 403 to exclude from the jury written evidence of the immunizing of a significant prosecution witness, such exclusion would have been not only an abuse of discretion, but a constitutional violation as well. The government does not identify a single case in which otherwise-admissible evidence of witness immunity has been excluded under Rule 403.

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[4] The government argues that in *McKeon* the Second Circuit "did not identify the specific rule of evidence on which exclusion should be based." Br. 22. But no court or commentator has ever read *McKeon* other than as a Rule 801(d)(2) holding. And the government concedes that "*McKeon* did not expressly"—nor in any other way—"rely on Federal Rule of Evidence 403." Br. 23.

[5] Nor did the Second Circuit. This Court recently reminded that an appellate court may not in the first instance perform a Rule 403 balancing. *Sprint/United Management Co.* v. *Mendelsohn*, 128 S. Ct. 1140, 1146 (2008).

C. The Government Fails To Address the Constitutional Violation.

The government lightly dismisses petitioner's Fifth and Sixth Amendment right to present evidence of a witness's bias as "essentially recast[ing] his evidentiary objection." Br. Opp. 29-30. It is more than that. Excluding evidence showing immunity granted to an important prosecution witness takes this case well beyond any ordinary application of Fed. R. Evid. 801(d)(2). This Court has held, going back to *Giglio* v. *United States*, 405 U.S. 150 (1972), that failure to permit the jury to be informed of a prosecutor's grant of immunity to a prosecution witness denies due process, even when—*as in Giglio itself*—government attorneys have later denied that they granted immunity and offered "differing versions of the events." *Id.* at 153. "[T]he true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence." *Holmes* v. *South Carolina*, 547 U.S. 319, 330 (2006). "[T]he fact of the inconsistency may properly be brought to the attention of the jury and the government put to the burden of explaining . . . ." *United States* v. *Powers*, 467 F.2d 1089, 1097 (7th Cir. 1972) (Stevens, J., dissenting), *cert. denied*, 410 U.S. 983 (1973) (cited with approval in, *e.g.*, *United States* v. *Kattar*, 840 F.2d 118, 131 (1st Cir. 1988)). The government was free to argue *to the jury* that its prior statements acknowledging immunity should not be believed. But petitioner was constitutionally entitled to show them to the jury, and to argue the opposite.

To exclude the government's five prior written admissions, the new prosecutors offered the new judge nothing more than Kearney's sudden denial of

immunity, and unsworn hearsay representations concerning Kearney's 15 to 20 meetings with previous prosecutors beginning eight years earlier. CAA 4742-44, 8297. A prosecutor's "remarks [are] not evidence." *United States* v. *Cutchin*, 956 F.2d 1216, 1218 (D.C. Cir. 1992). In *Giglio* the government, seeking to block evidence of a promise to a witness, at least presented sworn statements of "two assistants in their affidavits," 405 U.S. at 153; this Court through Chief Justice Burger nevertheless held that

> "evidence of any understanding or agreement would be relevant to his credibility and the jury was entitled to know of it."

Id. at 155.

D. The Government's Descriptions of This Record Are Not Reliable.

1. ***The Two-Year, Two-Trial, Five-Times "Mistake."***—The government now describes its two years of prior admissions as "an inadvertent mistake," Br. 14, as if what it formerly called "a slew of Government briefs and pleadings," CAA 2144, had been some one-time slip of the tongue. Instead of addressing this record, it conjures an imaginary prosecutor who referred to a witness but "had confused him with another individual," then "established to a virtual certainty that its earlier statement was a mistake," as was "made clear by relevant judicial records." Br. 25.

Not so here. The statements were made in court at least five times over two years. The "relevant judicial records" reveal the former prosecutors not only proposing an instruction on Kearney's immunity themselves, Ad. 4a, 6a, but making line-by-line edits to fine-tune the immunity instruction, Ad. 2a, 9a, and

filing a detailed legal memorandum acknowledging that, in the government's words,

> "a witness such as Kearney who is testifying pursuant to an informal immunity agreement *does* have a motivation to testify favorably for the Government . . . ."

Ad. 12a (emphasis in original). The prior judge confirmed with the government in open court that the jury would be instructed that Kearney had received immunity, and "[j]ust so we're clear, it's informal immunity of government witness and it's only about Kevin Kearney." Ad. 21a.

2. ***The Non-Existent Rule 104 Hearing.***—In this Court for the first time the government invents the tale (never mentioned in its brief below) that the District Court prior to its exclusion order conducted "a full inquiry," Br. 14, "a hearing pursuant to Federal Rule of Evidence 104," *id.* 10, leading to a "finding," *id.* 16. It complains that at "the Rule 104 hearing," "petitioner did not seek to present evidence on the issue of Kearney's proposed immunity." *Id.* 10.

There was no Rule 104 hearing. Ironically, petitioner twice had requested that one be held before any ruling to exclude the admissions,[6] but the District Court did not do so. What the Brief in

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[6] Petitioner had requested that "[a]t a minimum, the Court should conduct an evidentiary hearing . . . and permit inquiry of *all* of the prosecutors who interacted with Mr. Kearney and/or his counsel," C.A.A. 1730 (emphasis in original), "something that should be gone into before trial in an appropriate hearing where the proper witnesses and documents can be brought before the Court," *id.* at 7067-68.

Opposition now calls "the Rule 104 hearing," Br. 10, citing CAA 10105-10229, had nothing remotely to do with Kearney's immunity; it concerned only whether specified SEC and other government employees would testify reading notes of their witness interviews. Petitioner in his new-trial motion "renew[ed] his request for an evidentiary hearing on the subject of the statements and promises made to Mr. Kearney by the government between 1998 and 2004." Mot. 7. Neither the government in opposing that motion, nor the court in denying it, ever suggested that such a hearing already had taken place.

3. ***Inverted Burden.***—The government pretends that petitioner had to meet some additional burden before showing the jury evidence already declared admissible by the Federal Rules of Evidence. The government argues that "Rule 801(d) simply provides that a statement within the enumerated categories 'is not hearsay' . . . ." Br. 14. But Rule 402 provides that

> "[a]ll relevant evidence is admissible, except as otherwise provided"

by Constitution, law or rule. The statements by the government that Kearney had received immunity were unquestionably relevant. Fed. R. Evid. 401; *Giglio*, *supra*.

Although he had no obligation under Rule 801(d)(2) to corroborate further the government's five written admissions of informal immunity (which of course corroborated each other), petitioner pointed out that Kearney's counsel had described Kearney's "cooperation . . . rewarded by the U.S. Attorney's Office in its decision not to prosecute Kearney," as part of "*its own agreement with Kearney*." Ad. 15a-16a

(emphasis supplied). The government responded with yet another hearsay representation, that the letter's author six years later considered its wording "unfortunate." CAA Supp. 16.[7]

The government also quotes repeatedly the District Court's unexplained comment that the government's third-trial denial Kearney had immunity was "undisputed," even though "a slew of government briefs and pleadings," CAA 2144, certainly disputed it. PCA 13a; Br. I, 12, 13, 25. The government had told the court, "I don't think there's any dispute that there's no "*written* immunity agreement." Ad. 24a (emphasis supplied). But petitioner pointed out that "The issue is the existence of an agreement. It could be oral as well as written." Ad. 23a. Petitioner reiterated that "Our position is that . . . the government agreed not to prosecute him." Ad. 25a.

4. ***Crucial Error***.—The government now asserts—it did not do so in either court below—"the harmlessness of the alleged error." Br. 14.

(a) This newly-minted harmless-error argument could scarcely find a less appropriate vehicle. Here is a petitioner whom one jury declined to convict; a second jury also declined to convict; and a third jury, with a new judge, acquitted of one out of four charges. The government told the jury, "the question in dispute is this, simply put, whether the defendant knew about the fraud." CAA 10926. There was not a single document to tie petitioner to any violation, and

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[7] The government's contention that absence of immunity somehow was "corroborated" by a former official of the Connecticut Board of Accountancy, Br. 9, is unfathomable; he testified simply that "I was never told about any agreement by the U.S. Attorney or anybody else for that matter." CAA 9628.

only one prosecution witness who claimed direct knowledge of petitioner's having any role in misconduct. The government's case rested upon the testimony of that heavily-impeached[8] government witness, Corigliano, and thus depended upon his credibility. Kearney, in turn, was the only witness who corroborated the key part of Corigliano's testimony. Hence Kearney's own credibility was crucial.

It was not until the third trial, in which the new judge excluded any mention or evidence of Kearney's immunity, that the government was able to present Kearney as a wholly disinterested witness. For the third trial, the government moved Kearney to center stage, featuring him prominently in the prosecutors' closing arguments to the jury. See Pet. 10-11.

(b) The government now argues that the evidence of Kearney's immunity, which it fought so hard to keep from the jury in the third trial, really did not matter, because the jury probably caught on, anyway. "[T]he fact that Kearney had not been prosecuted and might therefore be biased was plain to the jury." Br. 27; see also *id.* 29. But, as the government itself previously pointed out, not having been prosecuted is different from having received a promise of immunity from the government. Ad. 24a-25a. And for any jurors not so sophisticated as the government imagines, petitioner's counsel had been specifically prohibited by the court from using the evidence of Kearney's immunity to connect the dots for them.[9]

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[8] See Pet. 3-4 n.4.

[9] "Mr. Forbes shall not be allowed to draw any inferences regarding the existence of an immunity agreement." PCA 13a.

E. The Record Is Focused.

This record frames the admissibility issue with stark clarity. The excluded statements were made:

—by the government's attorneys, not ordinary employees.

—in writing.

—in court.

—in the same prosecution.

—repeatedly.

—not as argument or opinion, but as to facts.

By its nature, informal immunity "encourages prosecutors to 'fly below the radar screen' in their offers of leniency to cooperating defendants." Cassidy, "*Soft Words of Hope*," 98 NW. U.L. REV. 1129, 1177 (2004). The original prosecutors frankly acknowledged Kearney's immunity, but failed to convict. The third-trial prosecutors erased those acknowledgments, and finally succeeded.

The Second Circuit here holds that the government, although it has at least *five times admitted* in writing making an immunity promise, later may simply assert "inadvertence," Ad. 24a, and press the "delete" key. Petitioner would have been permitted to bring those admissions to the attention of the jury if he had been tried in any of at least five other federal circuits. Which circuits are correct is an open issue this Court should now settle.

CONCLUSION

For the reasons stated herein and previously, certiorari should be granted.

Respectfully submitted,

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April 29, 2008

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ADDENDA

ADDENDUM 1

Government's First Admission (Oct. 8, 2004)*

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Filed JUN 30, 2004]

No. 3:02CR264 (AWT)

UNITED STATES OF AMERICA,

v.

WALTER A. FORBES and E. KIRK SHELTON.

PRELIMINARY PROPOSED JURY INSTRUCTIONS OF WALTER FORBES

* * *

PROPOSED JURY INSTRUCTION NO. 18
(Informal Immunity of Government Witness)

You have heard the testimony of witnesses Kevin Kearney, Steven Speaks, Mary Sattler, and [ ], who have been promised by the government that, in exchange for their testimony, they will not be prosecuted for any crimes they may have admitted either here in court or in interviews with the government. This promise was not a formal order of immunity by the Court, but was arranged directly between the witnesses and the government.

The government is permitted to make these kinds of promises and is entitled to call as witnesses people to whom these promises are given. You are instructed

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* C.A.A. 2127-28, 2130-31.

that you may convict a defendant on the basis of such a witness's testimony alone, if you find that his or her testimony proves every element of the offense charged beyond a reasonable doubt.

However, the testimony of a witness who has been premised that he or she will not be prosecuted should be examined by you with greater care than the testimony of an ordinary witness. You should scrutinize it closely to determine whether or not it is colored in such a way as to place guilt on the defendants in order to further the witness's own interests. Such a witness, confronted with the realization that he or she can win freedom by helping to convict another, has a motive to falsify his or her testimony.

Such testimony should be received by you with suspicion. You may give it such weight, if any, as you believe it deserves.

* * *

October 8, 2004

* * *

UNITED STATES' RESPONSE TO PRELIMINARY PROPOSED JURY INSTRUCTIONS, SUPPLEMENTAL PROPOSED JURY INSTRUCTIONS AND SECOND SUPPLEMENTAL PROPOSED JURY INSTRUCTIONS OF WALTER FORBES AND SUPPLEMENTAL PROPOSED JURY INSTRUCTIONS OF E. KIRK SHELTON

* * *

18 The Government joins in Forbes' request (after removal of the name Mary Sattler) and asks that this instruction be given immediately after Forbes' Proposed Instruction No. 17.

* * *

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ADDENDUM 2

Government's Second Admission (Oct. 24, 2005)*

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

No. 3:02CR00264 (AWT)
HON. ALVIN W. THOMPSON, USDJ

UNITED STATES OF AMERICA

v.

WALTER A. FORBES

UNITED STATES' PRELIMINARY REQUESTS TO CHARGE FOR RETRIAL

* * *

United States v. Walter Forbes, No. 3:02cr00264 (AWT) Government's Preliminary Proposed Final Instructions for Retrial October 24, 2005

Request No. 59

Informal Immunity of Government Witness

You have heard the testimony of witnesses Kevin Kearney and Steven Speaks, who have been promised by the government that, in exchange for their testimony, they will not be prosecuted for any crimes they may have admitted either here in court or in interviews with the government.

The government is permitted to make these kinds of promises and is entitled to call as witnesses people

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* C.A.A. 395-96.

to whom these promises are given. You are instructed that you may convict Mr. Forbes on the basis of such a witness's testimony alone, if you find that his testimony proves every element of the offense charged beyond a reasonable doubt.

However, the testimony of a witness who has been promised that he will not be prosecuted should be examined by you with greater care than the testimony of an ordinary witness. You should scrutinize it closely to determine whether or not it is colored in such a way as to place guilt on Mr. Forbes in order to further the witness's own interests. Such a witness, confronted with the realization that he or she can win freedom by helping to convict another, has a motive to falsify his testimony.

Such testimony should be received by you with suspicion, and you may give it such weight, if any, as you believe it deserves.

* * *

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October 24, 2005
Hartford, Connecticut

ADDENDUM 3

Government's Third Admission (Nov. 15, 2005)*

[On November 15, 2005, the government attorneys filed again the same requested jury instruction 59, entitled "Informal Immunity of Government Witness," that the government had filed October 24, 2005, pp. 4a-5a, *supra*.]

---

* C.A.A. 2135.

ADDENDUM 4

Government's Fourth Admission (Nov. 20, 2005)*

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

No. 3:02CR264 (AWT)
November 15, 2005

UNITED STATES OF AMERICA

v.

WALTER A. FORBES

PRELIMINARY PROPOSED JURY INSTRUCTIONS OF WALTER FORBES

PROPOSED JURY INSTRUCTION NO. 18

(Informal Immunity of Government Witness)

You have heard the testimony of government witness Kevin Kearney, who has been promised by the government that, in exchange for his testimony, he will not be prosecuted for any crimes he may have admitted either here in court or in interviews with the government. This promise was not a formal order of immunity by the Court, but was arranged directly between the witness and the government.

The government is permitted to make these kinds of promises and is entitled to call as witnesses people to whom these promises are given. You are instructed that you may convict a defendant on the basis of such a witness's testimony alone, if you find that his or her

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* C.A.A. 402-04, 2137, 2139.

testimony proves every element of the offense charged beyond a reasonable doubt.

However, the testimony of a witness who has been promised that he or she will not be prosecuted should be examined by you with greater care than the testimony of an ordinary witness. You should scrutinize it closely to determine whether or not it is colored in such a way as to place guilt on Mr. Forbes in order to further the witness's own interests. Such a witness, confronted with the realization that he or she can win freedom by helping to convict another, has a motive to falsify his or her testimony.

Such testimony should be received by you with suspicion. You may give it such weight, if any, as you believe it deserves.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

No. 3:02CR00264 (AWT)
November 20, 2005

UNITED STATES OF AMERICA,

v.

WALTER A. FORBES

UNITED STATES' RESPONSE TO PRELIMINARY PROPOSED JURY INSTRUCTIONS OF WALTER FORBES

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* * *

Forbes' Proposed Instruction	Government's response

* * *

18	This instruction appears to be substantially similar to the Government's Preliminary Request to Charge for Retrial No. 59. The Government has no objection to either version being given, but Mr. Speaks' name should be omitted if the Government's version is given, because he did not testify during the retrial.

* * *

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ADDENDUM 5

Government's Fifth Admission (Dec. 12, 2005)*

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

No. 3:02CR264 (AWT)
December 5, 2005

UNITED STATES OF AMERICA

v.

WALTER A. FORBES

MOTION OF WALTER FORBES (1) TO STRIKE IMPROPER REBUTTAL ARGUMENT BY GOVERNMENT AND (2) FOR A CURATIVE INSTRUCTION AND NOTICE OF CONTINUING WALLACH OBJECTION

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* * *

3. The government argued that Kevin Kearney has no motivation to lie and suggested that Mr. Kearney's testimony should be evaluated as that of an ordinary witness. *See* Tr. 3573 ("Well, Kevin Kearney didn't plead guilty to a crime. He does not have a plea agreement with the United States. His testimony had no bearing whatsoever on his SEC settlement made years ago. Does he have a motivation beyond that of an ordinary witness?"). This argument was improper in two respects. First, the government either knows or

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* C.A.A. 726-28, 759-62 (bracketed material in original).

should know that Kevin Kearney is *not* an ordinary witness because he has received informal immunity from the government, which did not prosecute him for his crimes in exchange for his cooperation. The Court will give the jury an instruction to that effect (*see* Instruction No. IV(R)), and the government itself requested such an instruction in its proposed jury instructions. It is entirely improper for the government to suggest to the jury that Kevin Kearney is a disinterested witness with no motive to falsify his testimony in favor of the government when the government knows that precisely the opposite is true. Second, the government improperly argued that Mr. Kearney's testimony had no bearing at all on his SEC settlement. There is no evidence in the record on this point, and the government's argument lacks any factual basis.

* * *

December 12, 2005

* * *

GOVERNMENT'S OPPOSITION TO DEFENDANT WALTER A. FORBES' MOTION (1) TO STRIKE ALLEGEDLY IMPROPER REBUTTAL ARGUMENT BY THE GOVERNMENT AND (2) FOR A CURATIVE INSTRUCTION AND NOTICE OF CONTINUING *WALLACH* OBJECTION

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* * *

3. Contrary to Forbes' contention, the Government never argued that Kevin Kearney had no motivation to lie. Rather, the Government accurately pointed out that Kearney was not testifying pursuant to a cooperating plea agreement, and asked the

rhetorical question, "does he have a motivation beyond that of an ordinary witness?" Tr. 3573. The purpose of the question was to contrast the motivation of a witness who has already received the benefit of an informal immunity agreement at the time of his testimony, and the very different motivation of a witness who has yet to receive the full benefit of a cooperation agreement at the time of his testimony because that witness has not yet been sentenced. *See United States v. Eltayib*, 88 F.3d 157, 173 (2d Cir. 1996) (where "the defendants' lawyers specifically attacked [the witness's] credibility and veracity in their summations," the prosecutor permissibly "asked the jurors to draw inferences based on their common sense that would lead to the conclusion that the witness"); *United States v. Feliciano*, 223 F.3d 102, 123 (2d Cir. 2000)(prosecutor permissibly "referred the jury to evidence at trial concerning [the prosecution witnesses], on the basis of which the jury could judge whether either witness had a motivation to lie").

After the challenged remark was made during the rebuttal, the Court instructed the jury that a witness such as Kearney who is testifying pursuant to an informal immunity agreement *does* have a motivation to testify favorably for the Government that is different from that of an "ordinary witness." Tr 3811-12. Accordingly, the Government's rhetorical question was answered in the affirmative by the Court, and no further curative instruction is necessary. In any event, because this Court "properly advised the jury that the arguments of counsel were not to be taken as evidence in the case . . . . that was adequate prophylaxis against the danger of the jury's finding the informant to be credible only because of the prosecutor's reply summation." *United States v.*

Suarez, 588 F.2d 352, 355 (2d Cir. 1978) (rejecting a claim that the Government's rebuttal summation was lacking in evidentiary support).

* * *

CONCLUSION

For the foregoing reasons, the Government respectfully requests that this Court deny Forbes' motion to strike portions of the Government's rebuttal argument or for a curative instruction.

Respectfully submitted,

CHRISTOPHER J. CHRISTIE
Special Attorney
U.S. Department of Justice

/s/ Norman Gross / de
/s/ Michael Martinez / de
By: NORMAN GROSS
MICHAEL MARTINEZ
CRAIG CARPENITO
Special Attorneys
U.S. Department of Justice

Dated: December 12, 2005
Hartford, Connecticut

ADDENDUM 6

Kearney's Counsel's Letter to SEC (May 5, 2000)*

Law Offices of
Roth & Fettweis, LLC
744 Broad Street Suite 701
Newark, New Jersey 07102
TELEPHONE: (973) 585-9495

May 5, 2000

Via Fax and Overnight Delivery

Richard H. Walker, Director
Division of Enforcement
U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: In the Matter of Cendant Corporation and Trading in Its Securities - File No. HO-3401 Kevin T. Kearney

Dear Mr. Walker:

Please accept this letter in lieu of a more formal Wells Submission on behalf of Kevin T. Kearney.

* * *

D. *The Staff's Recommendation Completely and Improperly Ignores the Cooperation that Kearney Has to Date Rendered to the Commission.*

Throughout the negotiations on a possible settlement of the Commission's claim against Kearney, the Staff has steadfastly maintained that its proposals do not and should not take into account Kearney's

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* C.A.A. 1743-1751.

cooperation with the Government's investigation. That cooperation, the Staff has maintained, has been rewarded by the U.S. Attorney's Office in its decision not to prosecute Kearney. The Staff therefore has insisted that, despite Kearney's valuable cooperation, it is nevertheless appropriate for the commission to seek devastating civil penalties from him.

The Staff's position is indefensible both as a matter of law and as a matter of policy. In determining whether to impose civil penalties, a Court would look, among other things, to a defendant's cooperation both in the litigation and settlement phases of a case as "a factor to be considered with all other relevant factors." *Securities and Exchange Commission v. Custable*, 1995 W.L. 117935, *6 (N.D. Ill. March 15, 1995). The Commission, in formulating its settlement policy in this case, should apply the law; it should. give due deference to the nature and extend [*sic*] of Kearney's cooperation in this case.

Kearney has, from the outset, provided important cooperation not just to the U.S. Attorney's office, but to the Commission as well. When Kearney began his cooperation with the U.S. Attorney's Office in August 1998, the Staff specifically solicited his simultaneous cooperation with the Commission. Thus, as early as August 24, 1998 debriefing session at the U.S. Attorney's Office in Newark, two representatives of the Staff were in attendance, with Kearney's specific consent. From that day until this one, the U.S. Attorney's meetings with Kearney have always been attended by members of the Staff as well. In the course of these debriefing sessions, Kearney has provided to the Staff significant information that, without a doubt, has substantially assisted the Commission in preparing its case against more culpable

violators. Now, having obtained the benefit of two years worth of cooperation from Kearney, the Staff somehow thinks it would be fair to ignore that cooperation in assessing penalties against him.

It should be noted, moreover, that at no time did the U.S. Attorney's Office condition its own agreement with Kearney upon his simultaneous willingness to cooperate with the Commission. Both Staff personnel and U.S. Attorney's Office representatives made it clear to Kearney that his decision about whether to cooperate with the Commission would be independent of his cooperation with the criminal prosecutors. His status as a non-target in the criminal investigation, in other words, was not dependent in any way upon the nature and extent of his cooperation with the Staff. In the same way that the Commission independently solicited Kearney's cooperation, it should also independently weigh the value of that cooperation to it in deciding whether to continue to insist upon Kearney's paying such harsh financial penalties.

It would be incredibly shortsighted for the Division of Enforcement to solicit cooperation from a relatively minor participant like Kearney and thereafter refuse to weigh that cooperation in connection with settlement of the case against him. Such a practice, if applied in all Commission cases, would ultimately have a devastating impact on the Commission's future ability to obtain cooperation from anyone. Moreover, in joint investigations like this one with the U.S. Attorney's Office, that practice could have a counterproductive impact on the Government's quest to arrive at the truth.

When someone involved in criminal wrongdoing agrees to cooperate with the U.S. Attorney's Office,

that Office necessarily demands that the cooperating individual be as frank and as open as possible regarding his own participation in the criminality under investigation. Anything short of complete candor would be potentially disastrous to the Government's construction of a successful criminal prosecution. Usually, through the vehicle of a preliminary proffer or some other similar device, the cooperating witness knows in advance what penalty he can expect in the criminal case. Thus, the witness's participation in U.S Attorney debriefing sessions creates no disincentive to truthful testimony. The Staff's policy in this case, on the other hand, would provide a strong motive for a would-be cooperating witness to do what Kevin Kearney absolutely did not do here: to hold back the full truth from Government investigators and thereby attempt to place himself in a better, less incriminatory light in the hope of avoiding ruinous SEC sanctions thereafter.

The Staff's notion that no benefit should be given to Kevin Kearney for his cooperation with the SEC is, simply put, bad public policy. Kearney's cooperation with the Commission should prompt it to offer him a resolution that will not wreak financial devastation upon him and his family. There is no reason in law or public policy for the Division of Enforcement to persist in a demand that Kearney pay ruinous civil penalties.

Kearney is prepared to pay disgorgement at the level sought by the Staff. He is additionally prepared to pay prejudgment interest on his disgorgement remittance. However, in light of all of the circumstances of this case, the additional civil penalties that the Staff would impose upon him are unnecessary, unfair, and unwise.

Very truly yours,

/s/ Robert J. Fetttweis
ROBERT J. FETTWEIS

RJF:ik
cc: David Frolich, Esq.

ADDENDUM 7

Transcript of Proceedings, Trial 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

No. 3:02CR264(AWT)
Hartford, Connecticut
December 6, 2005

UNITED STATES OF AMERICA

vs.

WALTER A. FORBES,
Defendant.

JURY TRIAL
VOLUME XXI

BEFORE: HON. ALVIN W. THOMPSON, U.S.D.J., and a Jury of 12

FOR THE GOVERNMENT:

U.S. DEPARTMENT OF JUSTICE
970 Broad Street, Suite 700
Newark, New Jersey 07101
BY: MICHAEL MARTINEZ, SPECIAL ATTORNEY
CRAIG CARPENITO, SPECIAL ATTORNEY

FOR THE DEFENDANT WALTER FORBES:
WILLIAMS & CONNOLLY
725 Twelfth Street, N.W.
Washington, D.C. 20005-5901

BY: BRENDAN V. SULLIVAN, JR., ESQ.
BARRY S. SIMON, ESQ.
ROBERT M. CARY, ESQ.
MARGARET A. KEELEY, ESQ.
MARCIE R. ZIEGLER, ESQ.

* * *

[3676] [THE COURT:] As to Mr. Kevin Kearney, I looked at the transcript pages that were cited in the objections that were filed and those transcript pages were 1194 and 1198, and I don't believe that they really go to the point that was objected to in terms of what is Mr. Kevin Kearney's motivation compared to that of an ordinary witness.

I think this is one where there should have been an objection made and I would have sustained the objection, because the statement—well, actually it's—it was really a question: Does he have a motive beyond that of an ordinary witness? The answer is: Yes. The government didn't make it as a statement. The government made it as a question, as I recall. Actually, I'm reading the defense motion at Paragraph Number 3.

But I think if an objection had been made, I [3677] would have sustained the objection based on the fact that I am going to give an instruction about the way the jury should evaluate the testimony of witnesses who have been given immunity.

But given the fact that I'm going to give that instruction to the jury, I think that will be sufficient, especially since an objection should have been made.

* * *

[3678] [THE COURT:] So for that reason I didn't think it was covered by the objection. It's one I would

have preferred to have dealt with at the time, but I think the fairest thing to do, the way things were handled, is to cover it in the charge and the jury will have the charge in the jury room with it. And this particular charge or paragraph in the charge only talks about Kevin Kearney and it lists, I'm pretty sure—let me check.

Just so we're clear, it's informal immunity of government witness and it's only about Kevin Kearney.

And I think that will be more than sufficient to address the issue in a fair way to proceed.

* * *

ADDENDUM 8

Transcript of Proceedings, Trial 3

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NO: 3:02CR0264(AHN)
September 20, 2006
9:43 A.M.
Bridgeport, CT

UNITED STATES OF AMERICA,
Plaintiff.

vs.

WALTER FORBES, ET AL
Defendants.

HEARING ON MOTIONS

BEFORE: THE HONORABLE ALAN H. NEVAS, U.S.D.J.

APPEARANCES:

FOR THE PLAINTIFF:	NORMAN J. GROSS MICHAEL MARTINEZ CRAIG CARPENITO U.S. Attorney's Office 401 Market Street Camden, NJ 08101
FOR THE DEFENDANT WALTER FORBES	BARRY S. SIMON ROBERT M. CARY TOBIN ROMERO Williams & Connolly LLP 725 Twelfth Street, N.W. Washington, D.C. 2005

* * *

[3] [THE COURT:] Why don't we take up, Mr. Simon, the areas that you think are very, very substantive. Where you have major differences with the government and then kind of maybe work our way back from there.

* * *

[4] MR. SIMON: Well as I said, we go through the fact, starting with Mr. Kearney's Wells submission, in which his own lawyer talks about an agreement with the government and says well it didn't cover cooperation with the SEC. He's talking about there being an agreement. The government, we had a first trial in which the lawyers who first dealt with Mr. Kearney and his lawyers agreed to the instruction. They specifically made it a joint instruction. There was a time when—in second trial, for example, where an instruction was not included—where a witness didn't testify and the government said okay, his name should come out, but that instruction should again be given. There's a long history of representations by the government that there was such an agreement.

And I think the government's relying on the fact [5] that in the second trial they asked Mr. Kearney, is there a written agreement? To which he said no. That's not the issue. The issue is the existence of an agreement. It could be oral as well as written. There's a Second Circuit case, the Refevra (ph.) [*LeFevre*] case which actually reversed the conviction where the government had an agreement with the witness and then tried to persuade the jury that it didn't exist. And the Court went through the whole—the wall—well the whole due process analysis of not just an issue of putting on false testimony, but not correcting

false testimony that is put into the record by the witness, including evidence that goes to credibility. And so if you take a look at I think it's at page two of our supplemental opposition, we lay out the entire history, attribute this to inadvertence, your Honor, I think is just—there's a long, long history of repeated representations. Which I think the government is bound.

MR. GROSS: Judge, I'm embarrassed to admit that this is was a matter of inadvertence.

THE COURT: Inadvertence in what respect?

MR. GROSS: In not objecting earlier in the first two trials to an instruction that Mr. Kearney testified pursuant to some sort of immunity. Simply put, he has never been given—your Honor, there is Craig [6] Carpenito, a member of the trial team. I know he hasn't appeared before you. He's a little bit late because he's getting here for the first time.

THE COURT: So the instruction was given—

MR. GROSS: Erroneously in the defendant's favor in the first two trials, and he's not entitled to the benefit of the same error in the third trial. The reason he is not entitled is because there is no immunity agreement with respect to Mr. Kearney, either oral or written. I don't think there's any dispute that there's no written immunity agreement.

The testimony that the defense points to to establish that there was an oral agreement appears on page 9881 and 9882 from the first trial. And on cross-examination Mr. Kearney's asked by defense counsel: When were you told that you wouldn't be prosecuted? Answer: I was told I was not a target of the investigation pretty early on. Now, your Honor,

there's a difference being told you're not a target of the prosecution early on in the investigation and being promised that you're not going to be prosecuted.

And we'll establish this conclusively at the third trial. Mr. Kearney will testify that he was never promised by any member of the prosecution team at any time that he would not be prosecuted. Even to this day. [7] Whether or not Mr. Kearney, you know, believes—

THE COURT: Who is Mr. Kearney's lawyer?

MR. GROSS: His lawyer is Bob Fettweiss. And we've spoken with Mr. Fettweiss recently and Mr. Fettweiss has confirmed that he never had any kind of an immunity agreement with the government on behalf of Mr. Kearney. In fact, it was his purposes not to get a proffer agreement—I'm sorry, an immunity agreement in this case.

So there's simply no basis for the instruction. And, you know, I look pretty foolish sitting here—and I haven't gone through two trials based on my assumption that there was an immunity agreement on behalf of Mr. Kearney; but when we got down and really looked hard at it, it turned out that there is not.

* * *

[8] MR. SIMON: Our position is that there was a cooperation agreement and that he received the benefit when the government agreed not to prosecute him. And that is consideration the government already gave him and he has an ongoing motive to cooperate as a result of that. And that provides the motive—

* * *

[14] MR. SIMON: Your Honor, the lawyers who dealt with Mr. Kearney and his counsel are not the lawyers that are sitting in the room; and they all agreed to the charge the first time. And there's an evidentiary basis for it and there are cases that—

THE COURT: What do you mean the lawyers—oh, you mean the prosecutors?

MR. SIMON: The prosecutors. The prosecutors. This is not just one set of prosecutors' inadvertence. There's multiple sets of prosecutors. They sat through [15] an entire trial. They knew what the evidence was, presumably. They knew what the instructions were. They heard the instruction given after having dealt directly with Mr. Kearney and his counsel. There's also law that just because a defense lawyer, for example, protects his client, doesn't, you know, expressly tell the client what the agreement is, doesn't change the fact that there is an agreement. And it's improper to withhold that from the jury. We've cited those cases in the various motions. We can get the specific cites if the Court wants. But this is something that the government has agreed to repeatedly. Two different sets of prosecutors, including the prosecutors who were there on the scene dealing with Mr. Fettweiss and with Mr. Kearney. And let me also say, your Honor, the context of this. This is the witness that we had an argument about last week who for five years says nothing about meetings with Mr. Bell, says nothing about any references to Walter Forbes and then five years later makes those statements and the government wants to present him as a disinterested witness with nothing to gain and present that to the jury. And frankly, in our perspective, that only compounds all

the Wallik [*sic—Wallach*] and due process issues with that testimony.

* * *

[19] MR. SIMON: . . . If he denied that he was given a promise, I believe we would be entitled to read this instruction that they were—that was given, that that was the government's position in two prior trials. That in fact he did have a promise that he wouldn't be [20] prosecuted. Because that's a government admission. I don't know whether the government wants to go down that road, but that's our position. We would be entitled to put that in as an admission by the government. If they want to put on a parade of agents and say oh, no, we didn't really promise him, we really didn't have that mutual understanding. That would be their burden. But we don't have to go down that road—

* * *

[24] THE COURT: Okay. Well I think my—As I said earlier, I think my instincts tell me the best thing to do here is to wait on this. I don't want to be unfair to either side and say now what I'm going to do. Because if I said I won't give the charge because the government's representing to me that no promises were made and then it turns out during the course of Mr. Kearney's testimony, whether it be on direct or whether it be on cross that he then says oh, yeah, my understanding was I had a promise. Then clearly the instruction is appropriate.

MR. SIMON: Your Honor, say he says I wasn't given a promise.

THE COURT: Was not?

MR. SIMON: Say he said I wasn't. It doesn't resolve the issue.

THE COURT: Well then the issue is a question of estoppel.

MR. SIMON: Or a government admission that can be offered into evidence to impeach him. That's the way it comes up. This is a formal pleading in which they [25] made the representation that that's what happened. Not once, but twice.

* * *